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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Appellant, v. DAVE VINCENT DEMARCO, Defendant and Respondent.	F068596 (Super. Ct. No. AP002918A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Raymonda Burnham-Marquez, Judge.

Lisa S. Green, District Attorney, Christopher Puck, Deputy District Attorney, for Plaintiff and Appellant.

R. Konrad Moore, Public Defender, Amanda L. Moceri, Deputy Public Defender for Defendant and Respondent.

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In *Barker v. Wingo* (1972) 407 U.S. 514, 530 (*Barker*), the United States Supreme Court created a four-factor test to judge a criminal defendant's claim that a delay in prosecution has violated his Sixth Amendment right to a speedy trial. In *Serna v. Superior Court* (1985) 40 Cal.3d 239, 252-253 (*Serna*), the California Supreme Court

held that, in misdemeanor cases, a delay of one year between the filing of a complaint and a defendant's arrest can be treated as presumptively prejudicial and thus can trigger judicial application of the *Barker* test. In *Bellante v. Superior Court* (2010) 187 Cal.App.4th Supp. 1, 6-7 (*Bellante*), the appellate division of the Kern County Superior Court held that, if a presumptively prejudicial delay within the meaning of *Serna* has taken place in a misdemeanor case, and the People fail to present good cause for the delay, then the complaint must be dismissed the application of the *Barker* test is unnecessary.

In this case, the trial court applied *Bellante* and dismissed the People's misdemeanor complaint against Dave Vincent DeMarco for shoplifting and battery. The complaint was filed 15 months before DeMarco's arrest and the People did not attempt to show good cause for the delay.

The People appeal and urge us to follow *Dews v. Superior Court* (2014) 223 Cal.App.4th 660 (*Dews*). In *Dews*, the First District Court of Appeal rejected *Bellante* and held that the *Barker* test must be applied to an accused misdemeanant's motion to dismiss on Sixth Amendment speedy-trial grounds even if the prosecution of the case has been delayed for a presumptively prejudicial period of time and the prosecution does not show good cause for the delay. (*Dews, supra*, at pp. 666-668.) The People maintain that *Bellante* misinterpreted *Serna* in holding otherwise and that *Dews* got it right.

We agree. We will reverse the judgment and remand to the trial court for application of the *Barker* test.

FACTS AND PROCEDURAL HISTORY

According to a police report, a man entered a Walmart store in Bakersfield on March 4, 2012. He took some ink cartridges and hid them in his pants. A store employee confronted him. The man pushed the employee out of his way, went out to the parking lot, and drove away in a car. The employee got the car's license plate number. The car turned out to be a rental and to have been rented by DeMarco. DeMarco was on

probation and there was an active felony arrest warrant out for him. On March 14, 2012, the Walmart employee identified DeMarco in a photo lineup. A detective went to the address DeMarco had given to the car rental company. The house appeared vacant and DeMarco was not there. The detective referred the matter to the district attorney for the filing of a complaint. On March 20, 2012, the district attorney filed a misdemeanor complaint alleging one count of petty theft (Pen. Code, § 448)[1] and one count of battery (§ 243, subd. (a)). The court issued an arrest warrant the same day.

The warrant outstanding at the time of the current offenses was in case No. BF134473A. In that case, DeMarco pleaded no contest on September 22, 2011, to one felony count of possession of a controlled substance. (Health & Saf. Code, § 11377, subd. (a).) Pursuant to a plea agreement, DeMarco was to be admitted to Proposition 36 probation. During a court appearance on October 20, 2011, however, DeMarco left the courthouse and could not be found after he was informed that he would be required to submit a urine sample for drug testing. The court revoked his probation and issued the arrest warrant.

DeMarco was finally arrested on June 7, 2013. He posted bond on June 13, 2013, and was arraigned in the current case on June 21, 2013. At four appearances in the current case—on July 12, July 26, August 16 and August 23, 2013—DeMarco requested continuances of pretrial proceedings and waived time for trial for 20 days on each occasion. (On the fourth occasion, the reason given for the continuance was to allow DeMarco to file his speedy-trial motion.) On September 24, 2013, DeMarco filed his motion to dismiss on the ground that his right to a speedy trial had been violated.

The trial court heard the motion to dismiss on October 9, 2013. DeMarco argued that *Bellante* was correct and should be followed. Under *Bellante*, he contended, the complaint should be dismissed because the delay between the filing of the complaint and

[1]Subsequent statutory references are to the Penal Code unless noted otherwise.

the arrest was presumptively prejudicial and the People did not show good cause for the delay. No *Barker* analysis was necessary. If the court did carry out the *Barker* analysis, DeMarco asserted, it should still find in favor of dismissal.

The People conceded that they had not shown good cause for the delay, but argued that this was not necessary to trigger the *Barker* analysis, that *Bellante* was incorrect in its holding to the contrary, and that two other superior court appellate divisions disagreed with *Bellante*.[2] (See *People v. Alvarado* (1997) 60 Cal.App.4th Supp. 1 (*Alvarado*); *Leaututufu v. Superior Court* (2011) 202 Cal.App.4th Supp. 1 (*Leaututufu*).) The People urged the court to apply *Barker* and find that the balance of the factors tipped in the People's favor.

The *Barker* factors are: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." (*Barker*, *supra*, 407 U.S. at p. 530, fn. omitted.) The People argued that a delay of 15 months, only three months longer than the one-year period considered to be presumptively prejudicial, did not weigh greatly in DeMarco's favor. The People stated that the reasons for the delay were that law enforcement had an exceptionally large number of bench warrants to execute in Kern County and that DeMarco, being already a fugitive in the earlier felony case when he committed the current offenses, was purposely evading the law. This meant that both parties were at fault for the delay. As to prejudice, the People argued that DeMarco did not present any evidence of actual prejudice, only the presumed prejudice based on the length of the delay itself. The People did not discuss the third *Barker* factor, the point at which DeMarco asserted his speedy-trial right.

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[2]The People also argued that there was no speedy-trial violation under the *state* Constitution because case law on the state constitutional right to a speedy trial requires a defendant to prove actual prejudice, and DeMarco had proved none. In this appeal, DeMarco argues only that his right to a speedy trial under the Sixth Amendment was violated. The state constitutional issue is not presented.

The trial court explained its ruling orally at the end of the hearing. It began by stating that it was "obliged to follow" *Bellante*. For the sake of argument, however, it said it would carry out a balancing analysis under *Barker*, as the People had asked it to do. Yet the analysis it then proceeded to perform followed the pattern of *Bellante*: The court concluded that the motion must be granted because the delay was presumptively prejudicial and the People had not shown good cause for it. Despite the People's arguments, the court appeared to assume that the record contained no evidence relevant to any of the *Barker* factors, other than the evidence of the length of the delay itself, so the result would be the same regardless of whether the court was applying *Barker* or *Bellante*. The key portion of the court's remarks is as follows:

> "Typically, when there is a presumptively prejudicial delay, the Court is required to then balance factors and those are often times called the *Barker* [*v.*] *Wingo* factors, those being the length of the delay, reason for delay, the defendant's assertion of the rights, and the prejudice caused by the delay.
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> "The Defense in this case has argued citing the [*Bellante*] decision that if the People do not proffer a justification for a year or longer delay that it's game over, that's the end of the analysis and the People have in other arguments said no, that's not the end of the analysis [and] that there has to be this [*Barker*] balancing. Let's just set aside the Defense assertion and go with the People's assertion. The balancing then is only a presumption of prejudice with no justification for the delay.
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> "In this case, there was no evidence as to why there was a delay. Clearly, the defendant has asserted his right and because it's presumptively prejudicial, there is no requirement[,] because it is a federal standard[,] that the defendant show actual prejudice. So really, even if you go with the People's assertion, you're doing the balancing. It still comes out in the defendant's favor."

The People filed a notice of misdemeanor appeal and subsequently applied to the appellate division of the Kern County Superior Court for certification of the appeal to this court. The appellate division certified the appeal to this court on December 19, 2013. We ordered the appeal transferred here on January 14, 2014.

DISCUSSION

The People urge us to reverse and remand on the ground that, by relying on *Bellante*, the trial court applied an incorrect legal standard to the Sixth Amendment speedy-trial issue. When reviewing a ruling on a motion to dismiss on speedy-trial grounds, we apply the abuse-of-discretion standard. (*Serna*, *supra*, 40 Cal.3d. at pp. 245-246; *Ogle v. Superior Court* (1992) 4 Cal.App.4th 1007, 1014.) It has been held that a trial court should be reversed if it denies a federal speedy-trial motion without considering all of the *Barker* factors. (*Ogle*, *supra*, at p. 1022.)

In *Barker*, the United States Supreme Court began its analysis by rejecting two "rigid approaches": the view that a defendant's Sixth Amendment speedy-trial right is violated whenever prosecution is delayed by a specified time period; and the view that there is no violation if the defendant has not demanded a speedy trial. (*Barker, supra*, 407 U.S. at pp. 522-524.) Instead, the court adopted the four-factor balancing test we have already discussed, weighing "the conduct of both the prosecution and the defendant …." (*Id*. at p. 530.) Elaborating on the four factors—the length of the delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defendant—the court explained:

> "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.… [T]he length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case.…
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> "Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence … should be weighted less heavily …. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

> "[T]he third factor … [t]he defendant's assertion of [the right] … is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.
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> "[The fourth factor, prejudice to the defendant] should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." (*Barker, supra*, 407 U.S. at pp. 530-532, fns. omitted.)

None of the four factors alone is a necessary or sufficient condition for finding the defendant's speedy-trial right to have been denied. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." (*Barker, supra*, 407 U.S. at p. 533, fn. omitted.)

The California Supreme Court applied *Barker* to a misdemeanor case in *Serna*, rejecting the view that the Sixth Amendment afforded lesser protection of the speedy-trial right in misdemeanor cases than in felony cases. (*Serna, supra*, 40 Cal.3d at pp. 254-259.) The court first concluded that a delay exceeding one year between the filing of the complaint and the arrest of the defendant was presumptively prejudicial. (*Id.* at pp. 252-254.) Next, the court stated that, because the delay in the case was presumptively prejudicial, the municipal court erred when it failed to receive evidence relevant to the *Barker* factors and to carry out the weighing of those factors as contemplated by *Barker*. (*Serna, supra*, at pp. 262-263.)

In *Bellante*, however, the appellate division of the Kern County Superior Court held that a presumptively prejudicial delay did not trigger an obligation by the trial court to apply the *Barker* factors, but instead triggered an obligation by the prosecution to justify the delay. In the absence of such justification, the complaint must be dismissed and the *Barker* analysis is inapplicable, the court believed. (*Bellante, supra*, 187

Cal.App.4th Supp. at pp. 4-7.) The court expressly rejected the opposite conclusion as reached by the appellate division of the Los Angeles Superior Court in *Alvarado, supra*, 60 Cal.App.4th Supp. at page 4. (*Bellante, supra*, at pp. 6-7.) In so holding, the court seized upon the Supreme Court's description in *Serna* of two pre-*Barker* cases, *Harris v. Municipal Court* (1930) 209 Cal. 55 (*Harris*) and *Gutterman v. Municipal Court* (1930) 209 Cal. 65 (*Gutterman*). (*Bellante, supra*, at pp. 6-7.) The *Serna* court stated: "In each [of these cases] the delay was considered unreasonable and thus prejudice was presumed with dismissal being constitutionally compelled in the absence of a demonstration of good cause for the delay." (*Serna, supra*, 40 Cal.3d at pp. 253-254.)

The *Bellante* court also quoted *People v. Lowe* (2007) 40 Cal.4th 937, 942 (*Lowe*), in which the California Supreme Court said: "'[T]he defense has the initial burden of showing prejudice from a delay in bringing the defendant to trial. Once the defense satisfies this burden, the prosecution must show justification for the delay.'" (*Bellante, supra*, 187 Cal.App.4th Supp. at p. 7.)

A year after *Bellante*, the appellate division of the San Francisco Superior Court decided a misdemeanor case involving the Sixth Amendment speedy-trial issue. (*Leaututufu, supra*, 202 Cal.App.4th Supp. 1.) The opinion in that case deals primarily with the question of whether the presumption of prejudice arising from a delay of more than one year—i.e., the presumption of prejudice that *triggers* the *Barker* analysis—also necessarily means the prejudice factor *within* the *Barker* analysis (the fourth factor) tips in the defendant's favor. (*Leaututufu, supra*, at pp. 9-10 [holding that presumptively prejudicial delay, while triggering *Barker* analysis, nevertheless failed to be weighty enough to tip analysis in defendant's favor, in light of other circumstances].) That issue is not before us in this appeal, but *Leaututufu* does presuppose, contrary to *Bellante*, that a presumptively prejudicial delay necessarily triggers a *Barker* analysis and does not lead to automatic dismissal whenever the prosecution fails to justify the delay.

At the time when this appeal was transferred to this court, there was no Court of Appeal opinion directly on point. Now, however, with *Dews*, there is, and the parties were aware of it when they submitted their briefs. In *Dews*, the First District Court of Appeal held that *Bellante* was in error. (*Dews, supra*, 223 Cal.App.4th at p. 663.) The court observed that it was already established in *Barker* that a presumptively prejudicial delay triggers a full analysis of the four factors. (*Dews, supra,* at p. 665.) The notion that the prosecution must earn a shot at the *Barker* analysis by first showing good cause for the delay was an innovation introduced by *Bellante*. (*Dews, supra*, at p. 665.) *Bellante* in turn based its decision on two erroneous interpretations of California Supreme Court opinions. First, *Bellante* misunderstood our Supreme Court's references to *Harris* and *Gutterman* in *Serna*. The *Serna* court quoted those cases in its discussion of the length of time necessary to make a delay presumptively prejudicial and did not imply that they could be construed to limit the application of *Barker*, which was decided by a higher court decades later. (*Dews, supra*, at p. 667.) Second, *Bellante* quoted *Lowe* for the proposition that, after a defendant shows a prejudicial delay, the prosecution must justify the delay. *Lowe*, *supra*, 40 Cal.4th 937, however, made this statement in the context of a speedy-trial analysis under the *state* Constitution, which, as all acknowledge in this case, follows a pattern different from the federal *Barker* analysis. (*Dews, supra*, at p. 668.)

We agree with *Dews*. *Bellante* misinterpreted *Serna*, misapplied *Lowe*, and is not consistent with *Barker*. Like *Dews*, we disapprove *Bellante*. (*Dews, supra*, 223 Cal.App.4th at p. 663.)

DeMarco attempts to save *Bellante* by interpreting it as if it applied only to cases in which there is no evidence that would support the prosecution under any of the *Barker* factors. In DeMarco's view, *Bellante* thus works as a kind of short-cut in cases where the prosecution's case is weak. *Bellante* does not say that is its purpose, however, and it would have little point if it did. A trial court would, in effect, still have to carry out the *Barker* analysis, since it would have to consider the *Barker* factors in order to determine

whether any evidence presented by the prosecution would cause the analysis to tilt in the prosecution's favor. Further, *Bellante* would still be in conflict with *Serna* and *Barker*, which do not contemplate any such short-cut.

DeMarco also says the trial court did actually carry out the *Barker* analysis, at least for the sake of argument, since it stated at the hearing that it was going to "go with the People's assertion." In spite of this remark, we conclude the trial court did not apply *Barker*. Immediately after making the remark, the court proceeded to consider only the facts that there was a presumptively prejudicial delay exceeding one year and that the prosecution did not try to show good cause for the delay, just as if it were applying *Bellante*. It did not appear to give any consideration to the other *Barker* factors or to the People's arguments regarding them.

Lastly, DeMarco argues that, even if the court did not do the *Barker* analysis, a proper application of that analysis to the record before us would lead to the conclusion that his right to a speedy trial was violated and the complaint must be dismissed. The People urge us to consider the record and reach the opposite conclusion. We express no opinion about what the result of the *Barker* analysis should be in this case. The trial court must make this determination in the first instance on remand.

As a final note, we point out that, although we are rejecting *Bellante*, we are not making new law. *Dews* already did that. Since *Dews* was decided by the Court of Appeal and *Bellante* by a superior court appellate division, *Dews* is binding on all superior courts and *Bellante* is no longer good law. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Decisions of every division of the District Courts of Appeal are binding upon … all the superior courts of this state, and this is so whether … the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction."].)

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion. The trial court is directed to apply expressly the balancing test of *Barker, supra*, 407 U.S. at page 530, and to make appropriate factual findings.

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Smith, J.

WE CONCUR:

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Levy, Acting P.J.

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Detjen, J.